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In The Supreme Court of the United States

OCTOBER TERM, 1963

WARREN TRADING POST COMPANY, a corporation,

Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,

Appellees.

JURISDICTIONAL STATEMENT

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v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This case is one of first impression under the Commerce Clause of the United States Constitution. It involves the constitutionality of a state statute and regulation licensing and taxing the privilege of engaging in commerce with the Indian Tribes.

Appellant Warren Trading Post Company (Trading Post) appeals to the Supreme Court of the United States from the judgment of the Arizona Supreme Court issued January 13, 1964. Trading Post submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 95 Ariz. 110, 387 P.2d 809 (1963), and is reprinted as Appendix A. Rehearing was denied without opinion. The Superior Court's decision is not reported and is reprinted as Appendix B. The judgment appealed from (being the Mandate) and the order denying rehearing are reprinted as Appendix C.

JURISDICTION

On August 26, 1958, Trading Post filed a complaint for declaratory judgment in the Superior Court of Arizona in and for the County of Maricopa, pursuant to Arizona Revised Statutes §§ 12-1831 et seq. (the Uniform Declaratory Judgments Act) and Arizona Revised Statutes § 41-1007 (the declaratory judgment remedy section of the Arizona Administrative Procedure Act).

The action resulted from a corrected assessment of Arizona Transaction Privilege Taxes levied upon Trading Post by the Arizona State Tax Commission (Commission) pursuant to Arizona Revised Statutes § 42-1312.A and Regulation 2.18.5 of the Commission's Combined Privilege Sales and Use Tax Regulations.

The declaratory judgment action was brought in order to secure a declaration that the statute and regulation, as construed and applied by the Commission, were invalid as a violation of Article I, Section 8, Clause 3 of the United States Constitution.

On October 7, 1959, the Superior Court entered summary judgment adverse to Trading Post.

On December 4, 1959, Trading Post filed notice of appeal to the Supreme Court of Arizona.

On December 4, 1963, the Arizona Supreme Court affirmed the lower court and rendered a written opinion.

On January 7, 1964, the Arizona Supreme Court denied rehearing, reflected in a minute entry of the same date.

On January 13, 1964, the Supreme Court of Arizona issued its Mandate to the Superior Court containing the judgment enforcing

the Arizona Supreme Court's decision and opinion entered December 4, 1963. 17 Arizona Revised Statutes, Supreme Court Rule 14(a).

On April 1, 1964, in the Supreme Court of Arizona, Trading Post filed notice of appeal from the Mandate to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. § 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Central R. Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 608 (1962); *Memphis Steam Laundry Cleaner v. Stone,* 342 U.S. 389 (1952); *Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3,* 266 U.S. 379, 385, 386 (1924); *Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265, 269, 270, 271 (1921); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288, 289 (1921); *Merchants' Nat. Bank v. Richmond,* 256 U.S. 635, 637 (1921).

STATUTES INVOLVED

Article I, § 8, cl. 3 of the United States Constitution provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The following provisions of the United States Code are material:

19 Stat. 200 (1876), 25 U.S.C. § 261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 25 U.S.C. § 262 provides:

> "Any person desiring to trade with the Indians on any

Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

22 Stat. 179 (1882), 25 U.S.C. § 264 provides in material part:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . ."

The following provisions of the Arizona Revised Statutes are pertinent:

Arizona Revised Statutes § 42-1308 provides in part:

"A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license . . . ."

* * *

"F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days."

Arizona Revised Statutes § 42-1309 in part reads:

"A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce

or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, . . ."

Arizona Revised Statutes § 42-1312 provides in material part:

"A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, . . ."

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5 provides:

"*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

Related statutes and regulations involved in this appeal are as follows:

61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110 (Buck Act)

R.S. § 2132, 25 U.S.C. § 263

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958)

Arizona Revised Statutes §§ 42-1301.2, .6, .8, .11, .13, .14 and .15; 42-1305

All of the foregoing are printed in full as Appendix D.

QUESTION PRESENTED

The Supreme Court of Arizona has construed Arizona Revised Statutes §§ 42-1308, 42-1312.A and Commission Regulation 2.18.5 as requiring a license for and authorizing a tax upon the privilege of making retail sales of tangible personal property to reservation Indians living upon the reservation, by an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on the Navajo Indian Reservation in the State of Arizona.

The basic question presented is:

> Whether Arizona Revised Statutes §§ 42-1308, 42-1312.A and regulation 2.18.5 as so construed are invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes;"[1]

STATEMENT OF THE CASE

Arizona has had a Transaction Privilege Sales Tax since the spring of 1935. § 1, Art. 2, Ch. 77, Session Laws of Arizona (1935). Among other things, it licenses and taxes the privilege of engaging in the business of making retail sales of tangible personal property in Arizona.

During all of this period, and before, the Congress of the United States had invested the Commissioner of Indian Affairs with the sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations governing their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 19 Stat. 200 (1876), 25 U.S.C. §§ 261-262. And, pursuant to his authority, the Commissioner of Indian Affairs has made and issued rules and regulations to govern the conduct and

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[1] The Stipulation of Facts before the Superior Court did not concern (1) off-reservation sales to Indians or non-Indians or (2) on-reservation sales to non-Indians. That Stipulation confined this case solely to a consideration of on-reservation sales to Indians. Transcript of Record 69 (T.R. 69).

affairs of the Indian Traders. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Trading without such a license subjects a person to serious penalties. 22 Stat. 179 (1882), 25 U.S.C. § 264.

In the spring of 1940 the First Assistant Solicitor of the Department of Interior (by formal written opinion) specifically held licensed traders' sales to Indians not to be subject to the Arizona Transaction Privilege Tax. 57 I.D. 124 (1940). Three years later this opinion (again formally) was reaffirmed. 58 I.D. 562 (1943). To date, there has been no change in the position of the Department of Interior.

Appellant Trading Post is a corporation organized and existing under the laws of Arizona (T.R. 4).[2] It is licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona, on lands leased by it from the Navajo Indian Tribe (T.R. 5).

On February 25, 1958, the Commission made a corrected assessment of Arizona Transaction Privilege Taxes against Trading Post under Arizona Revised Statutes § 42-1312.A and Commission Regulation 2.18.5 (T.R. 6). This $2,886.49 assessment was levied upon Trading Post's privilege of making retail sales of tangible personal property to reservation Indians from its store on the reservation during the period November 1, 1956 to December 31, 1957 (T.R. 6). But for one prior attempt in 1957, later cancelled, this was the first such assessment the Commission had made upon a licensed Indian Trader since the inception of the Arizona Transaction Privilege Tax in 1935. (Appendix A 11, 12; T.R. 166).

On August 26, 1958, Trading Post brought a declaratory judgment action in the Superior Court of Arizona in and for the County of Maricopa (T.R. 4-12). The Superior Court held against Trading Post, basing its opinion largely upon the following reasoning:

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[2] Fact Stipulation No. 3 provides that all facts alleged in Trading Post's complaint are admitted, except for two which are not pertinent to this Statement of the Case (T.R. 68, 69).

> "It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* [the Court having previously cited *Thomas v. Gay*, 169 U.S. 264 in support of that proposition] and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned." (Emphasis the court's.) (Appendix B1).

The Superior Court saw no difference at law between the state's right to levy a personal property tax upon the personal property of an Indian Trader, and a state's right to levy a privilege tax on the privilege of engaging in commerce with the Indian Tribes.

Trading Post then appealed to the Arizona Supreme Court (T.R. 27-29). The majority opinion of that Court affirmed the opinion of the trial court, while the dissent adopted and presented Trading Post's position in full (Appendix A).

The majority opinion's conclusion is that the tax is neither burdensome on nor inconsistent with federal purposes or laws (Appendix A9).

The dissent is based on the proposition that any privilege tax upon the privilege of engaging in commerce with the Indian Tribes is prohibited by Article I, Section 8, Clause 3 of the United States Constitution, since Indian commerce, like interstate and foreign commerce, is an area which has been reserved exclusively for (and actually occupied by) federal regulation (Appendix A10, 12-15).

HOW THE FEDERAL QUESTION WAS PRESENTED

Trading Post's Complaint:

Trading Post's complaint requested the Superior Court of Arizona to declare, among other things, that the tax imposed by the Commission under Arizona Revised Statutes § 42-1312 and Regulation 2.18.5 constitutes (1) "an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided in Section 8, Article I of the Constitution of the United States" (T.R. 8, 11); and (2) "an interference with the right of the Commissioner of Indian Affairs to fix the price at

which commodities handled by a licensed Indian Trader should be sold" (T.R. 11).

Commissioner's Answer:

The Commission admitted the factual allegations of the complaint but answered further that (1) "the tax imposed . . . is a valid exercise of the sovereign taxing powers . . . under [Arizona Revised Statutes] A.R.S. § 42-1312 . . ."; (2) that "the assessment is made under . . . a valid, lawful and constitutional regulation . . . [which] regulation does not constitute an interference with the exclusive power of Congress to regulate commerce with the Indian tribes, nor . . . violate the Constitution of the United States"; and (3) that the tax imposed "does not constitute an interference with any rights of the U.S. Commissioner of Indian Affairs" (T.R. 16, 17). Accordingly, the Commission prayed

> "that the tax imposed by the State Tax Commission be upheld and declared valid, and that the rules and regulations upon which the tax is based be upheld and declared valid." (T.R. 19.)

Memorandum Opinion of Superior Court of Arizona:

The Superior Court granted summary judgment in favor of the Commission, upholding the validity of the tax by finding there was no interference by the state with federal functions (Appendix B1).

Trading Post's Opening Brief to the Arizona Supreme Court:

On appeal to the Arizona Supreme Court, the Trading Post by its assignments of error, propositions of law and discussion in its brief renewed its contention that the Arizona tax statute and regulation were an infringement upon the powers granted to the federal government under the Commerce Clause of the Constitution (T.R. 40, 41, 57, 62).

Trading Post's Proposition of Law No. 3 specifically stated:

"A STATE PRIVILEGE TAX ON A LICENSED INDIAN TRADER INTERFERES WITH THE SOLE

POWER OF CONGRESS TO REGULATE COMMERCE WITH THE TRIBES AND IS INVALID." (Emphasis contained in the brief.) (T.R. 41, 42, 57).

The discussion of this proposition of law in the brief concluded as follows:

"We submit that sales of merchandise by a licensed Indian Trader to an Indian Tribe or to the individual Indian of that tribe on the Reservation constitute commerce with the Indian Tribes within the meaning of Article I, Section 8, Clause 3 of the Constitution and that any state imposed tax for the privilege of carrying on such commerce is invalid." (T.R. 62.)

Opinion and Dissent of Arizona Supreme Court:

The Arizona Supreme Court's majority opinion, after citing the applicable statutes (Arizona Revised Statutes §§ 42-1308 and 42-1312), concluded as follows:

"We restate our basic conclusions.

• • •

"Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

"Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant [Trading Post] does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

"The judgment of the court below is affirmed." (Appendix A9).

Justice Lockwood dissented, stating in part:

"In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262." (Appendix A10).

Trading Post's Motion for Rehearing and Supreme Court's Denial thereof:

Trading Post's Motion for Rehearing again raised the federal question (T.R. 161-164). The Motion was denied without further opinion by the Arizona Supreme Court (Appendix C1).

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented is one of first impression under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3, United States Constitution): Can a state license and tax the privilege of engaging in "... Commerce ... with the Indian Tribes;"?

The tax concerned is a privilege tax on the privilege of engaging in certain businesses. Arizona Revised Statutes § 42-1308.A; *Warren Trading Post Company v. Moore,* 95 Ariz. 110, ..., 387 P.2d 809, 811 (1963); *Arizona State Tax Commission v. Garrett Corp.,* 79 Ariz. 389, 390, 393, 291 P.2d 208, 209, 210 (1955); *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 284, 289, 226 P.2d 549, 552, 555 (1951).

And the phrase "... Commerce ... with the Indian Tribes;" as used in Article I, Section 8, Clause 3, United States Constitution, includes commerce with individual members of those tribes. *United States v. Holliday,* 3 Wall. 407, 417 (1866).

Nor does the "Buck Act" return to the states the right to levy a privilege tax upon Indian commerce. Instead, that act relates to persons residing or transacting business in "federal areas," the definition of which phrase does not include Indian reservations. 61 Stat. 641 (1947), 4 U.S.C. § 110(e); *Your Food Stores v. Village of Espanola,* 68 N.M. 327, 334, 361 P.2d 950, 955, 956 (1961). In any event, the immunity from state taxation of an Indian Trader is not a consequence of his physical situs on an Indian reservation but of the commerce he conducts with the Indian Tribes, the regulation of which is exclusively within the domain of the United States (Appendix A21). See 58 I.D. 562 (1943).

It would appear "... beyond dispute that a State may not lay a

tax on the 'privilege' of engaging in interstate commerce . . ." *Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959). See *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389 (1952); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1924); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1924).

Equally settled is the prohibition against the levy by a state of a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

This limitation of states' powers should apply with equal force to commerce with the Indian Tribes, absent a plain and intelligible reason to the contrary. *Gibbons v. Ogden*, 9 Wheat. 1, 193 (1824). The power of Congress over Indian commerce is not less than its power over interstate commerce. *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903).

If there be any difference, it would appear that Congressional power is greater with respect to Indian commerce than with the other two commercial areas. In earlier days, no state law had any force upon the reservation. *Worcester v. Georgia*, 6 Pet. 515 (1832). And while this rule has been somewhat modified, the basic policy has remained to the extent that when Congress has wanted the states to exercise power over the reservations, it has done so by express grant. This Court has held that only by express Congressional grant may the states gain such power. *Williams v. Lee*, 358 U.S. 217, 221, 223 (1959).

However, Congress did not grant power over Indian commerce to the states. Instead, Congress granted the sole power and authority to the Commissioner of Indian Affairs to appoint Indian Traders and regulate their commerce with the Indians. 19 Stat. 200 (1876), 25 U.S.C. § 261. And the Commissioner has exercised his rule-making power thereunder. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Additionally, with federal consent, certain of the tribes themselves have imposed their

own privilege tax upon commerce with the Indians (T.R. 162, 175, 176). But without federal consent even the tribes would be excluded from this arena by the sole power of the Commissioner to regulate Indian Traders. 60 I.D. 176 (1948). Finally, the special duties and powers of a guardian to protect his ward have long been recognized as being applicable in this forum. *United States v. Kagama,* 118 U.S. 375, 384 (1886).

Yet, the Superior Court and the Supreme Court of Arizona both declined to apply to Indian commerce the settled law prohibiting the states from taxing the privilege of engaging in interstate or foreign commerce.

The Superior Court found no distinction between personal property taxes and directly licensing and taxing the privilege of engaging in Indian commerce.

Distilled to its essence, the majority opinion of the Arizona Supreme Court bases its conclusion (that the states may legislate with respect to commerce unless such is clearly inconsistent with or burdensome upon federal purposes) upon four decisions of this Court. *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945); *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148 (1942); *California v. Zook,* 336 U.S. 725 (1949); *Cooley v. Board of Wardens,* 12 How. 299 (1851).

These decisions do indicate that certain areas of commerce are open to the concurrent control of Congress and the several states. The misconception engaged in by the majority opinion of the Arizona Supreme Court is that the right to license and tax commerce is within the perimeters of those areas. Such is not the holding of those cases. The exercise of this right by the states could not pass the tests for concurrent jurisdiction set forth therein. The majority opinion of the Arizona Supreme Court pointedly ignores the pertinent decisions of this Court which relate to licenses and privilege taxes upon commerce wherein the necessity for exclusive federal control is established.

It is urgent that this Court correct the error committed below at

the earliest opportunity. Even now, the decision of the Arizona Supreme Court in this case has been followed as a precedent by the District Court for Santa Fe County, New Mexico in Cause No. 32849 entitled "Paul E. Brink, dba Brink Trading Co., Plaintiff, vs. Bureau of Revenue State of New Mexico, Defendant." On facts substantially identical to those presented here, the court there stated in part:

> "Lest there be any misunderstanding it is well to point out specifically that this Court is not basing its decision on the basis that the Buck Act is applicable to the Navajo Tribe, but rather on the basis as outlined in the majority opinion of the Arizona Supreme Court in the *Warren Trading Post Co.* case, supra." (Opinion dated February 5, 1964, Montoya, J.)

We are advised that an appeal from this decision to the Supreme Court of New Mexico has been taken and is now pending.

Twenty-five states contain Indian reservations on which 471,938 Indians reside.[3] Of these states, all but four have a "sales" tax.[4] Therefore, it would appear reasonable to expect the question presented by this case to recur.

The economic impact of the decision appealed from extends far beyond the parties to this litigation. To the extent that the increased cost of doing business is ultimately reflected in increased prices, any privilege tax imposed upon the Indian Traders inevitably will constitute an additional burden upon the Indians themselves. Further, such tax would constitute an interference with the express purposes and plans of Congress to accomplish a rehabilitation and development of certain Indian tribes. Navajo Hopi Rehabilitation Act of April 19, 1950, P.L. 474, ch. 92. To the extent that the

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[3] These States are Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

[4] Idaho, Minnesota, Nebraska and Oregon. 1 C.C.H. Sales Tax Reporter, par. 301, pp. 601-07.

Commissioner of Indian Affairs does not permit the Indian Traders to pass the tax on, it will constitute an increased burden to all Indian Traders. Additionally, the matter is one of economic significance to all states containing Indian reservations which now have or may later adopt sales or privilege taxes.

Also, there is a conflict between the rights of Indian Tribes (with federal approval) to license and levy taxes on commerce within their reservations, and the rights of the states to license and impose similar taxes on that same commerce. The Papago Indian Tribe in Arizona, with the approval of the Department of the Interior, has recently enacted its own privilege transaction tax on federally licensed Indian Traders making reservation sales (T.R. 162, 175, 176). Resolution 43, Ordinance of the Papago Council, approved July 22, 1963. If the Arizona Supreme Court's decision is permitted to stand, Indian Traders will be subject to double licensing and taxation for the same privilege.

Finally, this case involves a sharp head-on collision between the United States and the State of Arizona — a clash between federal and state power to regulate commerce with Indian Tribes. That conflict is reflected in the directly opposing views of the two opinions of the United States Department of Interior on the one hand, and the Arizona Supreme Court's decision in this case on the other. 57 I.D. 124 (1940); 58 I.D. 562 (1943); Appendix A. It is reflected again in the dichotomy between the "... sole power and authority ..." given by Congress to the Commissioner of Indian Affairs (19 Stat. 200 [1876], 25 U.S.C. § 261) and to his predecessors since the beginning of the Republic (Act of July 22, 1790, 1 Stat. 137), and Arizona's asserted authority to license and tax commerce with the Indians conducted by Trading Post in this case. This conflict is real, not theoretical. These problems, we submit, should finally be resolved by this Court.

The case is appealed pursuant to 28 U.S.C. § 1257(2) from the highest court of the State of Arizona, the Arizona Supreme Court. Article VI, Sections 1, 3, 5, Constitution of Arizona. The appeal is taken from the Supreme Court's Mandate, which "... shall contain

the judgment of . . . [the Arizona Supreme] Court . . ." 17 Arizona Revised Statutes, Arizona Supreme Court Rule 14(a); see Appendix C 1-3. That judgment became effective as of the date of the Mandate, January 13, 1964. *Borrow v. El Dorado Lodge*, 75 Ariz. 218, 220, 254 P.2d 1027, 1028, 1029 (1953). It constitutes the final judgment of a final court. *Market Street Ry. Co. v Railroad Commission of California*, 324 U.S. 551 (1945). It is not subject to further correction or review. Any actions taken by the Arizona Superior Court in carrying out the judgment are ministerial. *Gusick v. Eyman*, 81 Ariz. 182, 184, 302 P.2d 944, 945 (1956).

The decision of the Arizona Supreme Court affirmed the decision of the Superior Court of Arizona, in and for the County of Maricopa. Both courts sustained the validity of the imposition of the Arizona Transaction Privilege Tax against the contention that it was invalid as being contrary to Article I, Section 8, Clause 3 of the United States Constitution. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Both courts based their opinion solely upon federal grounds (Appendices A and B). The federal question was timely raised, and so presented as to qualify for an appeal pursuant to 28 U.S.C. § 1257(2). *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

CONCLUSION

This appeal raises a single and important federal question of first impression applied to undisputed facts. It is respectfully submitted that the question is sufficiently substantial that for proper resolution and plenary consideration, it requires briefs on the merits and oral argument. Can a State license and tax the privilege of selling to Indians on reservations — a privilege which the United States has exclusive power and discretion to grant or withhold? The determination of this problem is necessary to fix the boundaries of power between the Federal Government, the States and the Indian Tribes with respect to the control of Indian commerce.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of Arizona of December 4, 1963

Appellant, Warren Trading Post Company, appeals from a judgment determining that certain taxes are due to the State of Arizona by reason of retail sales of personal property to reservation Indians residing on the Navajo Indian Reservation.[1]

The Arizona exaction arises out of the provisions of the Arizona Privilege Transaction Act, A.R.S. § 42-1308, requiring every person within Arizona[2] who receives gross proceeds of sale or gross income from sales to acquire a license for a fee of $1.00. A.R.S. § 42-1312 imposes a tax measured by an amount equal to 2% of the gross proceeds of sales or gross income on the privilege of selling any tangible personal property at retail.[3]

In considering collectively the arguments presented, we observe certain conclusions which weigh heavily in the decision.

Tax immunity is never enjoyed as a matter of right but only as an incidental windfall when, and only as long as, imposition of the state tax impairs or interferes with the exercise of a federal

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[1]Appellant, a domestic corporation, licensed as an Indian trader by the Commissioner of Indian Affairs under Act of Congress, 22 Stat. 179, 25 U.S.C. §§ 261, 264, is authorized by Article III of its Articles of Incorporation to, among other things: (a) Buy, own, hold, sell, barter, pledge, hypothecate cattle and other livestock and in general to conduct and carry on a ranch and livestock business. (b) Deal in cattle and property. (c) Lend money. (d) Deal in shares of stock, bonds, promissory notes. (f) Buy, sell, hold and lease or construct reservoirs, canals, dams. (i) Carry on the business of purchasing, manufacturing, producing, selling, and dealing in goods and wares, merchandise and materials of every kind. (m) Maintain in addition to its principal office at Flagstaff, Arizona, one or more offices for the transactions of its business either within or without the State of Arizona.

[2]Indian reservations are within the political, governmental and geographical boundaries of Arizona. Enabling Act, § 20 (2); Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456; Porter v. Hall, 34 Ariz. 308, 271 P. 411.

[3]The stipulation as to facts in the lower court specifically confined the question to taxes on sales to reservation Indians who reside on an Indian reservation. We assume that taxes arising out of sales to others on the Navajo Reservation have been paid and therefore the right of the state to levy and collect such taxes is not questioned.

function. Petition of S.R.A., Inc. v. State of Minnesota, 219 Minn. 493, 18 N.W.2d 442, affirmed 327 U.S. 558, 90 L.Ed. 851, 66 S.Ct. 749. The immunity here claimed represents a severe impairment of the taxing power of Arizona. It is one we would not be disposed to sustain unless we entertained grave doubts but that a federal function was impaired.

We have repeatedly held that this tax is on the privilege or right to engage in business and is not a sales tax although generally referred to as such, that it neither imposes a tax on the purchaser nor upon sales but rather taxes the seller for the privilege of engaging in business, that the tax is the direct obligation of the retailer and not that of the consumer, and further that there is no statutory authority for the retailer to attempt to constitute himself an agent of the state for the purpose of receiving the tax and transmitting it to the state. The legal incidence of the tax falls upon the seller and not upon the buyer.[4] Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208; State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549.

Were appellant an instrumentality of the United States Government by reason of its being licensed to do business with the Indians under the appropriate acts of Congress,[5] no exemption is to be implied.[6] Alabama v. King & Boozer, 314 U.S. 1, 86 L.Ed. 3, 62 S. Ct. 43, 140 A.L.R. 615. Exemption of the person upon whom the legal incidence of the tax falls is not to be implied regardless

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[4]The determination of the incidence of the tax by the state court is controlling, Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1, absent facts or construction upon which Federal Constitutional issues rest. Kern-Limerick v. Scurlock, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403.

[5]The Navajo Tribe of Indians, Amicus Curiae, asserts that the Warren Trading Post Company is not a federal instrumentality.

[6]Appellant, as a licensee of the federal government, can scarcely claim a better position as an instrumentality by which the government accomplishes its purposes than an employee of the federal government, Graves v. New York, ex rel O'Keefe, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595; or a contractee, James V. Bravo Contracting Co., 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208. See Alvard v. Johnson, 282 U.S. 509, 75 L.Ed. 496, 51 S.Ct. 273, 75 A.L.R. 9.

of the fact that the burden is passed on so long as Congress has not expressly exempted such person, Esso Standard Oil Co. v. Evans, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800. We conclude that the Navajo Indian Tribe, Amicus Curiae, is not entitled to assert a greater immunity from non-discriminatory taxation for traders with whom its members deal than the United States for its employees, contractees or other chosen agents, even were we certain that the economic burden must inevitably be shifted to the Indians.[7]

The Arizona exaction is non-discriminatory. It is not levied against Indians or Indian tribes as such but against all who engage in the business of selling within the geographical boundaries of the State of Arizona. The fact of legal title in the United States to the Indian lands is not sufficient to effect an exclusion of the state from excise taxes unless it appears that the state by consent or cession has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise.[8] Silas Mason Co. v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 58 S.Ct. 233. The authority of the state may rightfully extend to all matters not interfering with the Indian's protection by the government. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246. The applicability of state law depends upon "whether the state action infringed on the right of

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[7] "• • • we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, 87 L.Ed. 1612, 63 S.Ct. 1284.

There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status.

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. amend. X.

reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, reversing Lee v. Williams, 83 Ariz. 241, 319 P.2d 998.

Historically three powers of the Federal Government have been used to support congressional action in legislating on Indian affairs. The War Making Power was invoked by the First Congress on August 7th, 1789, by entrusting Indian affairs to the War Department. 1 Stat. 49, 50. It was the practice and policy of the federal government during the many years of tension between Indian and non-Indian to negotiate with the tribes and to settle differences by treaty if possible. See Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483. After the Civil War, it was recognized that assimilation not segregation of the Indians was necessary[9] and the use of the Treaty Making Power to deal with Indians as dependent alien nationalities was terminated by Congress in 1871. One of the last treaties was entered into with the Navajo Indians in 1868, Cohen, Federal Indian Law, 24, 210. For a more detailed background of the Navajo Tribe see Williams v. Lee, 358 U.S. 217, supra.[10] Neither appellant nor Amicus Curiae, the Navajo Indian Tribe, assert a tax immunity arising out of or supported by the terms of the Navajo Treaty with the United States.

In 1886 the Supreme Court of the United States examined a congressional enactment prescribing criminal laws for Indians living on reservations. In sustaining the plenary power of Congress to act in behalf of the Indians, the court said:

"From their very weakness and helplessness, so largely due

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[9]See for further changes in the policy of Congress, Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed. 2d 573, 82 S.Ct. 562.

[10]"There are many cases * * * recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations and treaties with them have been looked upon not as contracts but as public laws which could be abrogated at the will of the United States." Choate v. Trapp, 224 U.S. 665, 670, 671, 56 L.Ed. 941, 32 S.Ct. 565. Treaty rights would, of course, pre-empt those areas affected thereby and would require congressional sanctions before effective state action.

> to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384, 30 L.Ed. 228, 6 S.Ct. 1109.

Since then, the recognized relation of tribal Indians together with the commerce clause of the U. S. Const., art. 1, § 8 (3), granting to Congress the power "to regulate commerce with the Indian tribes" have been treated as the sources of congressional power, see Williams v. Lee, 358 U.S. 217, supra; Perrin v. United States, 232 U.S. 478, 58 L.Ed. 691, 34 S.Ct. 387, Johnson v. Gearlds, 234 U.S. 422, 58 L.Ed. 1383, 34 S.Ct. 794, without always pointing specifically to either.

We do not doubt the plenary power of Congress to legislate in behalf of its wards by providing for them such federal services as education, health and reclamation, or that Congress may permit tribal self-government. The exercise of state jurisdiction may not impede the federal government in the treatment of its wards nor may it undermine the authority of the tribe in the exercise of self-government, Williams v. Lee, supra. Neither may it impair a right granted or reserved by federal law. Village of Kake v. Egan, supra. Otherwise state laws may be applied to Indians.

Congress has customarily carved out reservations from the unreserved public domain lying within the geographical boundaries of the state either to be owned or held by the Indian tribes. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, supra. State law consistent with congressional legislation in behalf of its wards and with the tribal self-government is not excluded on these reservations.

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United

States or embarrass it in using the lands or interfere with its right of disposal.

"A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 651, 74 L.Ed. 1091, 50 S.Ct. 455.

Generally, it may be said that state laws apply to the extent they do not conflict with federal Indian laws.

"Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation], of such state laws as *conflict* with the federal enactments." United States v. McGowan, 302 U.S. 535, 539, 82 L.Ed. 410, 58 S.Ct. 286. (Emphasis supplied.)[11]

We do not find that Arizona by taxing appellant interferes with the United States in the use of reservation lands for the purposes for which they were established or that its tax tends to thwart the purpose of the federal government in caring for its Indian wards and leading them into the habits and ways of civilized life.

This brings us to the ultimate proposition advanced by the Navajo Indian Tribe that the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state. There is here equated the power to regulate commerce among the several states with the Indian tribes in the argument that the states are not allowed "one single — tax — worth of direct interference with the free flow of commerce." But we do not understand that the commerce clause provides an

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[11]See also New York ex rel Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307; Draper v. United States, 164 U.S. 240, supra. Note too United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869.

automatic pre-emption to the federal government of every area wherein conceivably Congress might act.

If there is an analogy to be drawn from the interstate commerce clause, still the possession of power in Congress does not exclude all state power. Southern Pac. Co. v. Arizona ex rel Sullivan, 325 U.S. 761, 89 L.Ed. 1915, 65 S.Ct. 1515. A state may legislate freely upon those phases of commerce which are left unregulated by the nation and if the prohibition of state action is only inferable from the scope and purpose of the federal legislation, it must be clear that state action is inconsistent with the federal provisions. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 86 L.Ed. 754, 62 S.Ct. 491. Local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental but not burdensome effect on interstate commerce. Calif. v. Zook, 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841; Cooley v. The Board of Wardens, 12 How. 299, 13 L.Ed. 996.

This brings us to the further assertion that the federal statutes on trading with Indians pre-empt the field of sales to Indians upon the Navajo Indian Reservation as against the Arizona Transaction Privilege Tax. By act of August 15, 1876, 25 U.S.C. § 261, Congress provided that:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

and by § 262:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

It is argued that if appellant "proved his fitness to trade with the Indians to the satisfaction of the Commissioner of Indian

Affairs and secured a license from the Commissioner, he would thereupon have the right, whether or not he applied for or received a Transaction Privilege Tax License from the defendants [members of the State Tax Commission], to set up as a trader on the Navajo Indian Reservation." But we do not think it follows because appellant is licensed by the Commissioner of Indian Affairs to engage in trade that he has also been commissioned to disregard state laws. Rather, we would think that the Commissioner of Indian Affairs in considering whether a trader is a "proper person" would consider whether he will or has complied with such state laws as are constitutionally consistent with the licensee's business.

By the Arizona Enabling Act, § 20, 36 Stat. 557, 568, the people of this state agreed with the United States to forever disclaim all right and title to all lands lying within Arizona's boundaries owned or held by any Indian or Indian tribes and that "* * * until the *title* of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Absolute jurisdiction does not mean invariably exclusive jurisdiction; the word "absolute" carries the meaning of undiminished not exclusive. Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2nd 573, 82 S.Ct. 562.

The same section of the enabling act further provides that "* * * all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." The taxation here forbidden is that of reservation lands. There is no general ceding of the taxation authority of the state. Congress has not provided non-taxability from excises although it could have.

> "If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, supra.

Moreover, any inference that this trader was intended by Congress to be relieved of the Arizona general non-discriminatory privilege transaction tax is to the contrary. By 61 Stat. 644, 4 U.S.C. §§ 105, 109, Congress authorized the states to extend sales taxes to persons residing on or carrying on their businesses and to transactions occurring in federal areas. While Congress specifically excluded Indians "not otherwise taxed," it did not purport to protect those who trade with Indians from taxation.[12]

We restate our basic conclusions.

First, assuming that appellant is an instrumentality of the United States government, no immunity from the tax will be implied.

Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

The judgment of the court below is affirmed.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

CHARLES C. BERNSTEIN, Chief Justice

JESSE A. UDALL, Vice Chief Justice

RENZ L. JENNINGS, Justice

LOCKWOOD, Justice (dissenting):

Chief Justice Waite has defined the judicial function in Minor v. Happersett, 21 Wall. 162 (1874) at 178:

"Our province is to decide what the law is, not to declare what it should be . . . . If the law is wrong, it ought to be

[12]We are not called upon to determine precisely the meaning of the of the [sic] language used by Congress. It is sufficient to say that Congress could have excluded appellant from the scope of the Arizona tax. But it did not.

changed; but the power for that is not with us."

In this case, I am convinced the majority of the Court misconceives what the law is in its concern over what the law in strict justice should be. The efforts of the federal government to protect the Indians may too long have held them as quasi-citizens living apart and lagging behind the rest of the nation in both privileges and proportionate responsibilities. Congress may have continued to hold too tightly its reins of control over commerce with tribal Indians. It may be that the system of favored "Indian traders" under license and control of the Commissioner of Indian Affairs is an anachronism in our modern economy. But it is not the function of this Court to change federal Indian policy. We should interpret, not amend the existing federal law and, on that basis, we should invalidate the tax in this case. In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians — an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262.

Before examining the relation between this privilege tax[1] and the Commerce Clause, the character of the problem in this case

[1]The following sections dealing with the transaction privilege tax are pertinent to this case. A.R.S. § 42-1308 provides in part: "A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the [Arizona state tax] commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license." * * * "F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days." [As amended, Laws 1956, Ch. 98, § 1.] Section 42-1309, in part reads: "A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted

(Footnote continued on following page)

needs to be more sharply focused. The majority treats this as an "exemption" case and, consequently, interprets strictly against the taxpayer. This is wrong. No exemption for an Indian trader exists in Arizona statutes; the appellant admits this. This case involves the *scope* of the Arizona privilege tax. While taxing power is inherent in the sovereign states, the states delegated certain taxing powers to the federal government in the Commerce Clause.[2] Therefore in this case, we must determine whether the tax commission has trespassed upon an area of commerce delegated to the federal government.

Consequently, for the purpose of determining the scope of this tax, we should observe established rules of construction. First, when construing the ambit of a tax, as opposed to an exception to a tax, this Court has traditionally interpreted favorably to the taxpayer and strictly against the tax commission. Alvord v. State Tax Commission, 69 Ariz. 287, 213 P.2d 363 (1950). In addition,

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by persons on account of their business activities . . . ." And A.R.S. § 42-1312 reads as follows: "A. The tax imposed by sub-section A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail . . . ." Moreover, any person against whom this tax is levied may be enjoined from continuing in business until he has complied with the statute, A.R.S. § 42-1334.

[2]The states delegated to the federal government the exclusive power to tax the privilege of trading with Indians. Regarding another trade area included within the Commerce Clause, the United States Supreme Court stated in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) at 608: "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate Commerce when they gave Congress the power 'To regulate Commerce with foreign Nations, and among the several states, [and with the Indian Tribes].' U.S. Const. Art. 1, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." Hence, the statement in the majority opinion that, by the language of the Enabling Act and the Arizona Constitution, Arizona ceded only the power to tax reservation lands is misleading. This statement ignores the division of taxing power in the federal constitution.

since 1935 when the Twelfth Legislature adopted this tax until 1956 when the tax commission issued Regulation 2.18.5 taxing Indian traders, the commission in administering the law had not construed the tax statute as including Indian traders. Although long administrative interpretation is not controlling, the courts give weight to such an interpretation when construing the law. Alvord v. State Tax Commission, supra; Van Veen v. County of Graham, 13 Ariz. 167, 108 Pac. 252 (1910). And in cases concerning possible exercise of power by states over Indian affairs, the Supreme Court of the United States, on the basis of the Commerce Clause, appears to have raised a presumption against such state action. See, e.g., Williams v. Lee, 358 U.S. 217, 220-221 (1959); Kake Village v. Egan, 369 U.S. 60, 74-76 (1962); and Worcester v. Georgia, 6 Pet. 515, 561 (1832), Chief Justice Marshall's great decision which first announced this principle.

The all-important subject of this case is the relation between the Commerce Clause and the Arizona privilege tax. The Commerce Clause delegates to the federal government the power to control three trade areas: interstate, foreign, and Indian commerce. This congressional power over Indians has been described as a power as broad as that to regulate foreign commerce,[3] and broader than that to regulate interstate commerce.[4] Indeed, this federal power

[3]United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876), where the Supreme Court declared at 194: "Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States, provided that legislative right of a State within its own limits be not infringed or violated. [Article IX, Articles of Confederation.] Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—*a power as broad and as free from restrictions as that to regulate commerce with foreign nations.*" (Emphasis added.)

[4]See 1 Ops. Att'y Gen. 645 (1824); 1 Willoughby on the Constitution of the United States, 2d ed., § 226, p. 397; Story on the Constitution of the United States, § 1097; and, especially, Prentice and Egan, The Commerce Clause of the Federal Constitution, p. 342 (1898): "The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people

(Footnote continued on following page)

over Indians may justifiably be characterized as plenary.[5]

Each trade area in the Commerce Clause may have been delegated to the federal government for a different reason. But a principle common to all three trade areas emerges from the Commerce Clause. A long line of "interstate commerce" and "foreign commerce" cases reveals a prohibition which applies equally to this "Indian commerce" case: A state cannot tax the privilege of engaging in an area of trade delegated exclusively to the federal government in the Commerce Clause.

Historically, a tax phrased in terms of a privilege for engaging in interstate commerce has been considered beyond the power of the states.[6] *Any* such tax "burdens" interstate commerce. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925). Two recent cases restating this position that the Commerce Clause completely protects interstate commerce from state privilege taxes are Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) and Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952). A state has no power to tax the privilege of doing interstate commerce because it is a privilege granted by the federal, not the state government.

The United States Supreme Court has not only forbidden a state privilege tax as a condition precedent to the beginning of an interstate business, but it also has denied the power of a state to impose a tax on the privilege of doing an exclusively interstate business after the business has begun. Such taxes have been struck down even though they were fairly measured according to the connec-

from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce."

[5]Worcester v. Georgia, supra; Willoughby, supra, pp. 379-402, 1327, 1328.

[6]The tax involved in the instant case has also been phrased in terms of a tax on the privilege of engaging in business. See A.R.S. § 42-1308 and Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955).

tions of a taxpayer with the taxing state. In *Spector Motor,* for example, the Supreme Court invalidated a Connecticut privilege tax imposed on an interstate trucking corporation and said at 609:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

See also, Alpha Portland Cement Co. v. Massachusetts, supra; Memphis Steam Laundry Cleaners, Inc. v. Stone, supra; Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

The United States Supreme Court has repeatedly invalidated a state tax phrased in terms of a privilege for engaging in interstate commerce. This Court recognized this prohibition against such a tax in Combustion Engineering v. Arizona State Tax Commission, 91 Ariz. 253, 371 P.2d 879 (1962). The United States Supreme Court has also struck down state taxes on the privilege of doing foreign commerce. Brown v. Maryland, 12 Wheat. 419 (1827), for example, concerned a Maryland tax imposed on a foreign importer. The Court invalidated the tax on alternative grounds: the Import-Export Clause[7] and the Commerce Clause. Discussing the impact of the Commerce Clause on the state tax, the Court said at 447:

> "Congress has a right, not only to authorize importation, but to authorize the importer to sell . . . . The power claimed by the State [of Maryland] is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

See also Crew Levick Company v. Pennsylvania, 245 U.S. 292 (1917).[8]

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[7]U. S. Constitution, Article 1, § 10, Clause 2.

[8]Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 75 (1946), cites *Brown* and *Crew Levick* with approval, although the *Richfield* decision was based on the Import-Export Clause.

Although no court before this has ruled on the validity of a state tax which is imposed on the privilege of doing business with the Indians, the principle prohibiting such a tax on interstate and foreign commerce should also apply to this case. Certainly the Indian trader here is no less favored by the Commerce Clause than is the interstate trucker in *Spector Motor* and the foreign importer in *Brown*. From the Commerce Clause emerges a principle forbidding a state tax on the privilege of engaging in an area of trade delegated exclusively to the federal government. Consequently, in my opinion, this privilege tax is invalid when imposed on a federal Indian trader. Arizona has no power to tax the privilege of doing business with the Indians because it is a privilege granted solely by the federal government.

Indeed, this prohibition arising from the Commerce Clause applies with greater force in the area of Indian commerce than in the other two trade areas. First, as opposed to interstate and foreign commerce, doing business with the Indians is a privilege conditionally granted by the federal government, not an individual right. While any person may engage in interstate and foreign commerce in the absence of regulations to the contrary, no one may sell to Indians unless licensed and rigorously regulated by the Commissioner of Indian Affairs.

Secondly, we have here a stronger case against a state privilege tax than in the case of foreign or interstate commerce because Congress has more fully occupied and regulated the area of Indian commerce. The federal government, for example, neither grants nor regulates the privilege of engaging in interstate commerce in the manner it grants and regulates the privilege of engaging in Indian commerce. Under the present law, the Commissioner of Indian Affairs has the exclusive power to regulate the kind, quality and price of the goods sold to the Indians. 25 U.S.C.A. §§ 261-264.[9] Implied prohibitions from the Commerce Clause set certain

[9] § 261 "*Power to appoint traders with Indians.* The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices

(*Footnote continued on following page*)

minimum conditions for engaging in interstate and foreign commerce. For Indian commerce, however, we have not only the implied prohibitions from the Commerce Clause, but a complete set of federal regulations which does everything except expressly prohibit this tax.[10]

Even so, the majority in this case, cites language from Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943), an estate tax case, and concludes: "Congress has not provided nontaxability [of Indian traders] from excises although it could have." As we have seen, the majority persists in treating this as an

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at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262 *"Persons permitted to trade with Indians.* Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1909.

§ 263 *"Prohibition of trade by President.* The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264 *"Trading without license; white persons as clerks.* Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . . ."

[10]The set of federal regulations regarding the operation of radio stations also does everything except expressly prohibit such a state tax. In Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U.S. 650 (1936), Justice Stone, writing for an unanimous court, invalidated a state occupation tax measured by gross receipts (which is really only another name for a privilege tax) when imposed upon a radio station operating under a federal license. One of the controlling facts was the requirement of the federal license. The act involved in the case, the predecessor of the Federal Communications Act, prohibited "any save licensees to operate broadcasting apparatus." The resemblance of this act to the federal regulation in the instant case, § 261, is apparent.

"exemption" case and in construing strictly against the taxpayer. Consequently, to support its position, the majority uses language from *Oklahoma Tax Commission*,[11] an "exemption" case. But this is a "scope" case; it concerns the ambit of the Arizona tax in relation to the powers delegated to the federal government in the Commerce Clause. Therefore, this Court should interpret favorably to the taxpayer. Alvord v. State Tax Commission, supra.

Moreover, the absence of express Congressional prohibition of this tax should not be interpreted as implied consent. At the time the federal regulations were passed, such a tax had never been proposed. In addition, where the power is exclusive, as it is here, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction. Robbins v. Taxing District of Shelby County, 120 U.S. 489 (1886); Phliadelphia & S. Mail Steamship Co. v. Pennsylvania, 122 U.S. 326 (1886); Leisy v. Hardin, 135 U.S. 100 (1889); and In re Rahrer, 140 U.S. 545 (1891). Consequently, the Commerce Clause precludes this tax on appellant, even in the absence of a specific prohibition by Congress.

The majority restates its two basic conclusions at the close of its opinion. The first conclusion regarding no tax exemption for a federal instrumentality is immaterial; appellant specifically abandoned this "instrumentality" theory during oral argument. The second conclusion has two premises: first, this tax imposed by Arizona is not "inconsistent" and, second, it is not "burdensome"

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[11]The majority quotes twice from *Oklahoma Tax Commission*. While some language from that case may superficially appear applicable, it actually has no relevance to the instant case. Not only is *Oklahoma Tax Commission* an "exemption" case, but Oklahoma Indians are anomalous. The United States Supreme Court recognized this in *Oklahoma Tax Commission* at 604. See also Cohen, Federal Indian Law (1956) 1051. Consequently, a case involving Oklahoma Indians does not necessarily apply to this case involving Navajo Indians. The relation between the Navajo Indians and Arizona differs significantly from the relation between the Oklahoma Indians and Oklahoma. See also Williams v. Lee, supra, at 222-223. Arizona has assumed fewer responsibilities than Oklahoma and the Navajo Indians have exercised a greater degree of tribal autonomy than the Oklahoma Indians.

to federal purposes or laws. I will analyze these premises in inverse order.

When determining that this tax does not have a "burdensome effect" on Indian commerce, the majority uses the "local activity" test from California v. Zook, 336 U.S. 725 (1949) and Cooley v. The Board of Wardens, 12 How. 299 (1851). This reasoning suffers from what might be termed a "transplanted category."[12] This is what Walter Wheeler Cook warned against when he wrote:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."[13]

A test developed for the purpose of protecting the free flow of interstate commerce does not necessarily accomplish the purpose of protecting Indian commerce. The "local activity" test of *Zook* and *Cooley* has relevance when applied to an interstate commerce problem; Congress wanted to protect the free flow of trade between states, but did not intend to regulate local activities. But this "local activity" test has no relevance when applied to this Indian commerce problem. Formerly, Indians were considered "the wards of the nation." United States v. Thomas, 151 U.S. 577 (1894). Recent decisions have described the role of the federal government in relation to Indians as a protective trusteeship. See, e.g., United States v. McGowan, 302 U.S. 535 (1938). Congress, therefore, has the duty of regulating commerce with the Indians, even if this commerce appears to be a "local activity" because it takes place wholly within the boundaries of Arizona. Consequently, it is fallacious to reason that this tax does not constitute a burden on

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[12]For an enlightening discussion of this fallacy, see Hancock, "Fallacy of the Transplanted Category," 37 Can. Bar Rev. 535 (1959).

[13]Cook, Logical and Legal Bases of the Conflict of Laws (1942), p. 159 quoted in Hancock, *op. cit.*, p. 575.

Indian commerce just because it is measured by a "local activity."[14] So much for the majority's "burdensome" reasoning.

And when determining that this tax is not "inconsistent" with federal purposes, the majority gives us an interesting history of federal powers and then concludes, without further explanation, that this tax does not conflict with federal laws. But the Department of the Interior, in a formal opinion by the First Assistant Solicitor, could not have been more clear and more definite in this regard:

> "Question has arisen as to how far Indians and persons trading with Indians are subject to the sales taxes imposed by Arizona law. Since the problem is a general one and the Arizona statutes in question are not dissimilar in substance from the sales tax laws of other States and since the subject has been previously covered only in informal memoranda, I have determined to treat the question in a formal opinion.
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> * * *
>
> "The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians.
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> * * *
>
> "Where Congress has exercised its authority it is axiomatic that the field is closed to State action. Sperry Oil and Gas Co. v. Chisholm, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions.
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> * * *
>
> "Traders on Indian reservations who are non-Indians are,

[14]For the same reasons, we would fallaciously transplant another category if we applied to the instant case the "intrastate transaction" test of International Harvestor Co. v. Department of the Treasury of Indiana, 322 U.S. 340 (1944).

in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians.

* * *

"The preceding part of this opinion demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall be sold to the Indians." 57 Interior Dept. Decisions 124 (May 8, 1940).[15]

An "interference with the authority of the Commissioner of Indian Affairs" is inconsistent with federal purposes and laws. Despite this unequivocal language, the majority opinion audaciously advises the Commissioner of Indian Affairs, when determining whether a trader is a "proper person," to "consider whether he will or has complied with" the imposition of the tax in question. So much for the majority's "inconsistent" reasoning.

The majority opinion refers to 61 Stat. 641, §§ 105 and 109 (commonly referred to as the "Buck Act") as a specific congressional authorization to the states to extend sales taxes to persons residing in or carrying on their business and to transactions occur-

[15]The Arizona statutes permit a seller to "add" the tax to the sale price separately, or to "absorb" it in the specified sale price. Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955). It would obviously be specious reasoning to say that a seller in "absorbing" the tax fails to make his price cover the amount of the tax. In either event, it is ultimately passed on to the purchaser.

ring in "federal areas." Section 110(e) of the Buck Act defines "federal area":

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States . . . ."

This definition does not include Indian reservations. An Indian reservation is land held by the United States for Indian use, not for use by the United States. See Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950 (N.M. 1961). All the Buck Act purports to do is subject to state taxation persons previously not taxed because the transaction "occurred in whole or in part within a federal area."[16] The basis for not taxing an Indian trader is not the physical location of the trading post, but the fact that such a trader conducts "commerce with the Indian Tribes" within the language and purpose of the Commerce Clause. If the legislation regulating Indian traders was based upon the power of Congress to control entry and operations on the area where the trading post is located, then perhaps the Buck Act might be construed to give congressional consent to state taxation. But state taxation in the instant case conflicts with federal policy based on Commerce Clause regulation, rather than on proprietary or jurisdictional regulation. See 58 Interior Dept. Decisions 562 (December 24, 1943).

The thesis of the majority opinion, reduced to its simplest elements, is: The Arizona tax in question is imposed on all persons within the territorial boundaries of the state for the privilege of engaging in the business of selling at retail. The state has imposed the tax on the seller, and it is not concerned with his manner of sale or choice of buyers. He is not required to collect the tax from the buyer. He may do so by collecting it in addition to the specified

[16] See, e.g. Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652 (D.C. Okla. 1943) (contractors on Fort Sill Military Reservation); Hill v. Joseph, 129 N.Y.S. 2d 348 (1954) (concessionairies on Bedloe's Island); Kiker v. City of Philadelphia, 31 A.2d 289 cert. denied 320 U.S. 741 (1943) (employees of League Island Navy Yard); Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) (employees of naval ordinance plant); City of Springfield v. Kenney, 104 N.E.2d 65 (Ohio App. 1951) (residents of federal housing project).

selling price, or he may "absorb" it in the price to the purchaser.[17] The state has no interest in the source which the seller uses in remitting the tax, although it is calculated on the selling price. Therefore if the seller chooses to sell to Indians on a reservation, this neither relates to the imposition of the tax on the trader, nor does it interfere with or violate any federal constitutional or statutory provision.

Since the trader in this case is a business corporation, not a charitable or philanthropic organization, it would be unrealistic to suppose that the trader would abandon the general business practice of passing a tax on to the consumers in some form. The factor which the majority opinion overlooks or ignores is that in doing so, the trader must adjust his selling prices. In turn, this adjustment of selling prices becomes a factor *created by state fiat* which the Commissioner of Indian Affairs and the trader must take into consideration in determining the prices at which a trader must sell merchandise to reservation Indians. This applies to traders already licensed by the Commissioner, as well as to those making application for the privilege in the future.

The majority maintains this situation does not create an interference with the regulation of commerce with the Indian tribes. I maintain that it does.

LORNA E. LOCKWOOD, Justice

[17] Arizona State Tax Commission v. Garrett Corp., supra.

APPENDIX B

Memorandum Opinion of the Superior Court of the State of Arizona, Maricopa County, September 9, 1963

The parties have stipulated to the facts. The only question is, "May the State of Arizona levy a privilege sales tax upon a licensed Indian Trader with respect to sales made by him to Indians on the Navajo Indian Reservation?"

The Arizona Sales Tax does not impose a sales tax on the *purchaser* nor upon the *sale*, but instead, places the tax on the *seller*, for the privilege of engaging in business, and fixes the gross income from sales as the base for computing the tax. Thus, the incidence of the tax is not on the Indian purchaser, nor on the sale made to him, but on the trader for the privilege of transacting business as a merchant.

The U. S. Supreme Court has held that a state may tax the property of non-Indians located on an Indian reservation on the theory that such taxation does not interfere with the exercise by the Federal Government of its constitutional and statutory authority. *Thomas v. Gay, 169 U.S. 264.* At least two state courts have held that a state may tax the property of Indian traders, including their stock in trade. *Moore vs. Beason, 7 Wyo. 292; 51 Pac 875; Cosier vs. McMillan, 22 Mont. 484; 56 Pac 965; Noble vs. Amaretti, 11 Wyo. 230; 71 Pac 879.* In *Surplus Trading Co. vs. Cook, 281 U.S. 647*, it was stated that Indian Reservations are a part of the state within which they lie, and the laws, civil and criminal, of such state, have the same force therein as elsewhere within her limits, save that they can have only restricted application to *Indian wards*. Private property, within such a reservation is subject to taxation under the laws of the state.

It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned. A tax on the stock in trade is as much interference as a tax on the privilege

of selling. Both are too remote to constitute interference with governmental functions.

Plaintiff makes an analogy between the Indian trader and such instrumentalities of the Federal Government as Post Exchanges, claiming the former is entitled to the same immunities from state taxation. There are, however, important distinctions:

(a) Government officers, under governmental regulations, handle and are responsible for all funds of Exchanges; whereas the Indian trader handles his own funds.

(b) Profits from operation of Post Exchanges, if any, do not go to individuals. They are used to improve the soldiers' mess and for other governmental purposes. The trader retains his profits.

(c) An Indian trader is not an officer of the government and his goods are his own private property, which he may sell indiscriminately to Indians or non-Indians.

(See *Standard Oil Co. vs. Johnson*, 316 U.S. 481, for discussion of nature of Post Exchanges).

The Indian trader is not, in my opinion, an instrumentality of the Federal Government, but is rather a private business entity licensed to carry on a mercantile pursuit on the reservation under rather strict governmental supervision. The court adopts the ratio decidendi set forth in *Cosier vs. McMillan, 22 Mont. 484; 56 Pac 965* and *Noble vs. Amaretti, 11 Wyo. 230; 71 Pac 879.*

There will be an order granting the defendants' motion for summary judgment, and denying the plaintiff's motion for summary judgment. This case has been difficult to decide and the court wishes to commend counsel for both sides in the splendid briefs submitted in support of their respective positions.

DATED THIS 9th DAY OF SEPTEMBER, 1959.

s/ YALE MCFATE
Judge

APPENDIX C

Order of the Supreme Court of Arizona Denying Rehearing

The following action was taken by the Supreme Court of the State of Arizona on January 7, 1964, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing — DENIED. Justices Lockwood and Jennings voted to grant.

ORDER: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

ORDER: Petition of Papago tribe to intervene and to file brief Amicus Curiae — DENIED, as extending the issues. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173."

SYLVIA HAWKINSON, Clerk
By L. BROOKS, Assistant Clerk

Mandate of the Supreme Court of Arizona

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

WARREN TRADING POST COMPANY, a corporation,

Plaintiff,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION,

Defendants,

Case No. 101942:

said Superior Court on October 7, 1959 entered the following Summary Judgment:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with interest thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid."

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

And whereas, in April, in the year of our Lord one thousand nine hundred and sixty-three, the said cause came on to be heard before the said Supreme Court and was submitted for decision after argument of counsel.

On consideration whereof, it was on the fourth day of December in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on December 19, 1963, Appellant filed Motion for Rehearing, on consideration of which the Court on January 7, 1964, ordered that the Motion for Rehearing be denied and further ordered: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable JESSE A, UDALL Chief Justice of the Supreme Court of the State of Arizona, the thirteenth day of January, in the year of our Lord one thousand nine hundred and sixty-four.

SYLVIA HAWKINSON
Clerk of the Supreme Court of the
State of Arizona

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APPENDIX D

Constitutional Provisions, Statutes and Regulations

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264:

§ 261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.

§ 263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians

of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110:

§ 105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from

sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

§ 108

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 109

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 110 .

As used in sections 105-109 of this title —

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

Federal Regulations:

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958):

§ 251.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential Prohibition

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe. (R.S. 2132; 25 U.S.C. 263.)

§ 251.3 Forfeiture of Goods

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs. (R.S. 2133, as amended; 25 U.S.C. 264)

§ 251.5 Government employees not to trade with Indians except in certain cases

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided,* That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further,* That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States Employees, Indian blood.* Indian employees of the United States Government, of whatever degree

of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U.S.C. 68a, 87a, 441)

§ 251.6 Small Purchases

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

(R. S. 2078; 25 U. S. C. 68)

§ 251.8 Regulating Sale of Arms and Ammunition

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.9 Application for License

Application for license must be made in writing on Form 5-052,[1] setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 5-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

§ 251.10 Bond Requirements

(a) Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of

$10,000, or such less sum as may be designated by the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

(b) The residence of each principal and surety must be distinctly stated, and the signature of each of them attested by two witnesses, and it must appear for whom each witness signs.

(c) Individual sureties must not be bonded officers of the United States, attorneys having business before the Bureau of Indian Affairs, or employees of the principal.

§ 251.11 License Period

No license will be granted for a longer period than 1 year; but at the end of that time, if the Commissioner of Indian Affairs is satisfied that the trade has been conducted properly and that the laws and regulations and terms of the license have been duly observed, a new license may be granted.

§ 251.12 License Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 251.13 Power to Close Unlicensed Stores

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal; the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 251.14 Trade Limited to Specified Premises

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 251.15 License Applicable for Trading Only by Original Licensee

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 251.16 Trade in Annuities or Gratuities Prohibited

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 251.17 Tobacco Sales to Minors

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 251.18 Intoxicating Liquors

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 251.19 Drugs

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 251.21 Gambling

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 251.22 Inspection of Traders' Prices

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at Trader's Risk

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the

collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash Payments Only to Indians

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 251.25 Trade in Antiquities Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 251.26 Infectious Plants

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

§ 252.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians of the Navajo, Zuni, and Hopi Reservations may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 252.2 Presidential Prohibitions

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or any particular articles, into the country belonging to the Navajo, Hopi, and Zuni Indians and to direct that all licenses to trade with such tribes be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe or members of any other tribe residing on the Navajo, Zuni or Hopi Reservations.
(R. S. 2132; 25 U. S. C. 263)

§ 252.3 Forfeiture of Goods

Any person whether Indian or white who shall establish himself as a trader within the exterior boundaries of the Navajo, Hopi, or Zuni Reservations, or introduce goods or trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession and shall moreover be liable to a penalty of $500.
(R. S. 2133, as amended; 25 U. S. C. 264)

§ 252.4 Government Employees Not to Trade with Indians

No person employed by the United States Government shall have any interest or concern in any trade with the Indians, except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.
(R. S. 2078; 25 U. S. C. 68)

§ 252.5 Purchase in Small Quantities Allowed

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.
(R. S. 2078; 25 U. S. C. 68)

§ 252.6 Application for License

Application for license or renewal of license must be made in writing on a form provided by the Commissioner of Indian Affairs, setting forth the full name and residence of the applicant and three responsible references. If applicant is a firm, the firm name and the name of each member thereof; the place where it is proposed to conduct the trading post; and upon the request of the superintendent, the capital invested or to be invested and of this the amount of capital owned and the amount borrowed, or to be borrowed; the name of the lender of the borrowed capital; the date due, the rate of interest to be paid; indorsers and security; copy of any contract or trade agreement, or agreements, oral or written, with creditors or financing individuals or institutions, including any stipulations whereby financing fees are to be paid, directly or indirectly, tending to restrict the trader as a bargainer in the wholesale markets or otherwise to increase the delivered wholesale costs of merchandise at the trading posts. Application must be accompanied by satisfactory evidence as to the character, experience, and business ability of applicant and his employees and their general fitness to reside on the Indian reservation. All such information shall be considered as confidential. No employee in the Government service shall exert undue influence, direct or indirect, to help any applicant secure a license.

§ 252.7 Records, Reports and Obligations of Traders

(a) Each trader shall keep in a form approved by the Commissioner of Indian Affairs accurate records of his business activities and render annually not later than March 1 a report to the superintendent showing capital investment, increases and withdrawals, whether in the form of cash, merchandise, or other property; the value of buildings and improvements, furnishings and fixtures, miscellaneous assets such as automobiles, trucks, or other property essential to

the business; a complete record of all liabilities, including accounts, bills and notes payable, and the amount of cash received and disbursed, balances, whether on hand, on deposit, or due the store; the accounts, and notes receivable, and the pawns of pledges taken. The names and respective interests of all persons participating in the business shall be furnished.

(b) The price of all articles of merchandise placed on sale shall be plainly and visibly marked by the trader.

§ 252.8 Licensee; Owner of Trading Post

A licensee of a trading post shall be the owner of the business. He shall be responsible to the Commissioner of Indian Affairs for the entire operation of the trading post, including acts of commission or omission of his employees, and for reports required by the Commissioner of Indian Affairs.

§ 252.9 Bond Requirements

Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the superintendent or the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

§ 252.10 License Period

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the permit or lease held by the licensee on restricted Indian land. The license period in no event shall exceed 25 years. Licenses for periods not to exceed 10 years may be issued by the area director.

§ 252.11 Application for Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on a form[1] prescribed by him, through the superintendent, at least 3 months prior to expiration of the existing license, and the superintendent must report to the Commissioner of Indian Affairs as to the record the applicant has made as a trader and his fitness to continue under such a license.

§ 252.12 Temporary Permits

No trader shall carry on trade with the Indians without a license, or continue to trade with the Indians after the expiration of the license. A temporary license for 3 months may be issued by the Commissioner of Indian Affairs, or his duly authorized representative, pending consideration of application for renewal of license. In case the trader has neither a temporary permit nor a renewal of license, the Commissioner of Indian Affairs or his duly authorized representative is authorized to close the trading post of such trader. Upon the approval of the tribal council concerned, a trader may be granted the use of not to exceed eight acres of tribal land as a site for a trading post, corrals and other buildings required in connection with the business.

§ 252.13 Trade Confined to Licensed Premises

All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent.

§ 252.14 Subleasing; Livestock Herding Prohibited

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs, and the consent of the tribal council concerned. A license to trade with Indians does not

confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation or in conjunction with Indians.

§ 252.15 Gambling Prohibited

Gambling, by dice, cards, or in any way whatever including any mechanical device is strictly prohibited in any licensed trader's store or on the premises.

§ 252.16 Security

(a) Traders may accept pawns or pledges of personal property for security of accounts due to them by Indians. Traders shall be liable for the market value of all pawns or pledges held by them. The market value shall be settled by agreement between the Indian and the trader at the time of the transaction. In all cases where pawns or pledges are accepted by the trader a written receipt shall be given the Indian showing (1) the date of the transaction, (2) the nature of the pawn or pledge, (3) the amount loaned thereon, and (4) its market value as agreed upon between the Indian and the trader. A pawn or pledge not redeemed within 11 months shall be displayed in a conspicuous place in the trader's store for a period of 30 days together with a notice stating that unless the amount due, which shall be specified, is paid before the expiration of the 30 days, such pawn or pledge will be forfeited. At the expiration of 12 months from the date of the original loan, a pawn or pledge not redeemed shall become the property of the trader, in which event the amount due shall be cancelled on the trader's books. Notice of such cancellation shall be given in writing to the interested Indian.

(b) On the Navajo Reservation the period for the redemption of a pawn or pledge shall be 6 months unless at least 30 days prior to the expiration of such period not less than 25% of the amount due has been paid, in which case the redemption period shall be 8 months; an additional

period of 2 months shall be added to the redemption period for every additional 25% of the amount due that may be paid. The provisions of paragraph (a) of this section with respect to display, forfeiture, and payment within any 30 day period of grace, shall be applicable also to pawns or pledges taken on the Navajo Reservation.

§ 252.17 Credit at Trader's Risk

A trader may extend credit to Indians, but such credit will be at the trader's own risk. All payments to Indians for products or labor must be made in lawful United States money or in credit on the traders' books at the option of the Indian. Receipt must be given Indians for all articles they have sold to traders and on which they have requested book credit. These receipts must show the following information: (a) the date the transaction was made, (b) the amount paid the Indian, and (c) a description of the article or articles sold. All receipts issued by the trader for Indian products must be recorded in the trader's books in such manner that all information contained in the receipt is duplicated. Receipts may be transferred upon order of the initial recipient if it is to his convenience that such a procedure be followed.

§ 252.18 Government Checks Paid in Cash

Traders must pay all Government checks accepted in cash, merchandise or credit to the full value of the check presented. The acceptance of cash, merchandise, or credit for Government checks shall be at the option of the Indian in all cases.

§ 252.19 Premises Kept in Sanitary Condition

The traders shall keep both their premises and places of business in a clean, sanitary, and presentable condition at all times and shall avoid exposure of foodstuffs to infection from the air, dust, insects or handling. It shall be the duty of the health officers of the reservation and their assistants to make periodical inspections, recommend improvements, and

report thereon to the Commissioner of Indian Affairs or his duly authorized representatives.

§ 252.20 Traders' Responsibility

Traders shall be kept responsible through bond for any loss of Indians' property in their possession, including credit on books.

§ 252.21 License Fee

(a) An annual license fee of $50.00 shall be paid in advance by all licensed traders who are not members of the Navajo, Zuni, or Hopi Tribes. The area director shall determine the amount of such license fee to be paid by licensees who are members of the Navajo, Zuni, or Hopi Tribes. No such annual license fee shall exceed $50.00. All fees shall be deposited to the credit of the account "Indian Moneys, Proceeds of Labor, Navajo Agency (or Hopi or United Pueblos Agency)" and may be expended by the administrative official in the enforcement of the regulations in this part.

(b) On the Navajo Reservation, this license fee shall be paid on the basis of a calendar year regardless of any change in ownership of the business covered by the license unless the license be canceled for cause. When a license is issued following the cancellation of a license for cause or when a new business is established after the beginning of a calendar year, the license fee shall be determined on a quarterly basis, but the quarterly fee of $12.50 shall be charged also for a fraction of any quarter of a year. A transfer fee of $5.00 shall be collected whenever an unexpired license is transferred or assigned during a calendar year to a new owner of a trader's business.

(c) Deposits made by a temporary licensee under this part as provided by § 252.12 shall be refunded in the event a license is not issued unless the temporary licensee conducts a trading business during the period of temporary operation in which event the temporary licensee shall be charged a fee

on a quarterly basis for the period during which the business was conducted and the balance of the deposit shall be refunded.

§ 252.22 Grants and Donations Prohibited

No licensed trader shall be permitted to grant or donate any money or goods to the performance of any Indian dance or ceremony.

§ 252.23 Introduction of Livestock Prohibited

The introduction of livestock by traders or others into the Navajo, Hopi, and Zuni Reservations is prohibited except by special permit issued by the superintendent.

§ 252.24 Trade in Antiques Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 252.25 Imitation Indian Crafts Prohibited

It shall be forbidden for any person to introduce or have in his possession for disposition or sale to Indians or others, within the exterior boundaries of the forementioned reservations, any Indian arts and crafts, which are, according to established standards, imitation or spurious. Violators may be punished at the discretion of the superintendent.

CROSS REFERENCE: For Indian arts and crafts standards and certificates of genuineness, see Chapter II of this title.

§ 252.26 Sunday Trading

Traders shall not keep their places of business open on Sundays. However, this shall not be construed as prohibiting traders from accommodating travelers or Indians coming from a distance to trade in case of emergency.

§ 252.27 Purchase of Annuities and Gratuities Goods Prohibited

Traders are forbidden to buy, trade for, or have in their

possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians, may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the livestock belong, except by special permit issued by the superintendent.

§ 252.27a Amusement Companies

All carnival companies, circuses, theatrical companies, all persons, firms or companies conducting or operating portable dance pavilions, mechanical devices such as ferris wheels, carousels, or other devices for carrying passengers, and all persons operating games of skill, shall be considered traders and shall be required to obtain a license and to pay such fees as may be prescribed by the superintendent in charge of the jurisdiction, based on the number and class of devices or units to be operated (not less than $5.00 nor more than $25.00 per unit); and shall post a surety bond in an amount not exceeding $10,000.00 and a personal injury and property damage liability bond of not less than $500.00 nor more than $20,000 as may be required by the superintendent.

§ 252.27b Peddlers

All itinerant peddlers or purveyors of foodstuffs or other merchandise shall be considered traders and shall be required to obtain a license or permit from the superintendent setting forth the class of trade or peddling to be carried on; shall pay such fee as may be prescribed by the superintendent, and shall post such surety bond (not less than $500.00 nor more than $10,000.00) as may be required by the superintendent.

§ 252.27c Fees of Governing Body

The fees prescribed by these regulations shall not be considered as precluding the governing body of any Indian res-

ervation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate.

§ 252.28 Amendments

The regulations in this part are subject to change and addition with reasonable notice, at the discretion of the Commissioner of Indian Affairs. The trader is subject to revocation of license, and forfeiture in whole or in part of bond in the event of any violation of the regulations in this part.

Arizona Revised Statutes

§ 42-1301

In this article, unless the context otherwise requires:

* * *

2. "Business" includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.

* * *

6. "Engaging", when used with reference to engaging or continuing in business, includes the exercise of corporate or franchise powers.

* * *

8. "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

* * *

11. "Person" or "company" includes individual, firm, partnership, joint adventure, association, corporation, municipal corporation, estate, trust or any other group or combination acting as a unit, and the plural as well as the singular number.

* * *

13. "Sale" means any transfer of title or possession, or both,

exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes:

(a) Any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(b) The fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property.

14. "Sale at retail" means a sale for any purpose other than for resale in the form of tangible personal property, but "transfer of possession", "lease" and "rental" as used in the definition of "sale" means only such transactions as are found upon investigation to be in lieu of sales as defined without the words "lease or rental."

15. "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the senses.

§ 42-1305 **Rule Making Power of Commission**

The commission is authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this article.

§ 42-1308

A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1.

§ 42-1309

A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310 through 42-1315.

§ 42-1312

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

1. The sale of stocks and bonds.

2. Professional or personal service occupations, or businesses which involve sales or transfers of tangible personal property only as inconsequential elements thereof.

3. Services rendered in connection with or in addition to the sale of tangible personal property at retail by businesses or occupations other than those to which subdivisions (a)

through (h) of paragraph 2 of § 42-1310 and § 42-1311 are applicable.

Arizona Tax Commission Regulation 2.18.5

Trading Posts on Indian Reservations. A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction.